

1 UNITED STATES BANKRUPTCY COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----X
4 In re: : 15-22872 (RDD)
5 SAMMY ELJAMAL, :
6 Debtor. : 300 Quarropas Street
7 : White Plains, New York
8 :
9 : September 14, 2016
10 -----X
11 THE OFFICIAL COMMITTEE OF UNSECURED :
12 CREDITORS OF S, : 16-08217 (RDD)
13 :
14 v. :
15 :
16 CENTRALIZED MANAGEMENT SERVICES :
17 INC., et al., :
18 :
19 -----X

20 TRANSCRIPT OF HEARING ON APPLICATION FOR APPOINTMENT
21 OF CHAPTER 11 EXAMINER;
22 OPPOSITION TO THE APPLICATION FOR APPOINTMENT OF CHAPTER 11
23 EXAMINER (RELATED DOCUMENT 273);
24 SUPPLEMENTAL STATEMENT (RELATED DOCUMENT 273)
25 STATEMENT OF NEW YORK FUEL DISTRIBUTORS, LLC; METRO NEW YORK
DEALER STATIONS, LLC; JMM FUELCO, LLC; AND WEIL FAMILY II
LLC (RELATED DOCUMENT 273);
OBJECTION TO MOTION RE APPOINTMENT OF EXAMINER (RELATED
DOCUMENT 273);
MOTION TO DISMISS ADVERSARY PROCEEDING;
OMNIBUS MOTION TO DISMISS ADVERSARY PROCEEDING;
BEFORE THE HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE

20 APPEARANCES:

21 For the Debtor: ANNE PENACHIO, ESQ.
22 Penachio Malara, LLP
23 235 Main Street, #610a
24 White Plains, New York 10601

25 [Appearances continue next page.]

Proceedings recorded by electronic sound recording,
transcript produced by transcription service

APPEARANCES CONTINUED:

For the Committee: MELANIE L. CYGANOWSKI, ESQ.
Otterbourg, PC
230 Park Avenue
New York, New York 10169

For Musa Eljamal: JOHN J. MORGAN, ESQ.
Barr & Morgan
22 Fifth Street
Stamford, Connecticut 06905

For the US Trustee: PAUL K. SCHWARTZBERG, ESQ.
Office of the US Trustee
201 Varick Street, Room 1006
New York, New York 10014

For Leon Silverman: ROBERT RATTET, ESQ.
Herrick & Feinstein LLP
2 Park Avenue
New York, New York 10016

For New York Fuel
Distributors: CARLOS CUEVAS, ESQ.
1250 Central Park Avenue
Yonkers, New York 10704

JONATHAN KRAUT, ESQ.
Harfenist Kraut & Perlstein LLP
2975 Westchester Avenue, Suite 415
Purchase, New York 10577

For Centralized: YENISEY RODRIGUEZ-McCLOSKEY, ESQ.
Rodriguez-McCloskey, PLLC
300 Cadman Plaza W., 12th Floor
Brooklyn, New York 11201

Court Transcriber: MARY GRECO
TypeWrite Word Processing Service
211 N. Milton Road
Saratoga Springs, New York 12866

1 (Proceedings began at 12:11 p.m.)

2 THE COURT: In re Eljamal.

3 MALE SPEAKER: No, I think you're on [inaudible].

4 MR. MORGAN: If it please the Court, I think I'll
5 stay here since [inaudible].

6 THE COURT: That's fine.

7 MR. MORGAN: And for the record, this is John Morgan
8 for Musa Eljamal.

9 THE COURT: Right. And I'm doing the main case
10 first. The adversary proceeding will be second.

11 MS. PENACHIO: Good morning, Your Honor. Anne
12 Penachio on behalf of the debtor, Sammy Eljamal, who is with
13 me in the courtroom today.

14 THE COURT: Good morning.

15 MS. CYGANOWSKI: Melanie Cyganowski; Otterbourg PC,
16 counsel to the Committee.

17 MR. CUEVAS: Good afternoon again, Your Honor.
18 Carlos Cuevas for New York Fuel Distributors.

19 MR. KRAUT: Jonathan Kraut, same appearance.

20 MR. RATTET: Robert Rattet; Herrick Feinstein for
21 Leon Silverman and [inaudible].

22 MR. SCHWARTZBERG: Your Honor, Paul Schwartzberg for
23 the Office of the US Trustee.

24 THE COURT: So everyone can sit down unless they're
25 speaking. The only matter on I believe in the main case is

1 the US Trustee's motion for the appointment of an examiner
2 under 1104. I read the parties, the many parties who've
3 weighed in on that motion. I think I've read all their
4 pleadings and supplemental pleadings. I think I should hear
5 from the US Trustee first.

6 MR. SCHWARTZBERG: Good morning, Your Honor.

7 THE COURT: Good morning.

8 MR. SCHWARTZBERG: Good afternoon, Your Honor.

9 THE COURT: Good afternoon.

10 MR. SCHWARTZBERG: I don't want to repeat what's in
11 the papers and what the counsel has said. The only thing I
12 would like to put forth in addition is things I've had
13 conversations with counsel for the parties. As Your Honor is
14 aware, there have been allegations against the committee,
15 allegations regarding Mr. Eljamal regarding the conduct. I
16 thought it appropriate at this point to have an independent
17 entity come in, perhaps have the debtor -- I'm sorry in terms
18 of the committee, have the committee put its pencil down, have
19 an examiner look at their actions and determine whether an
20 examiner thinks that the committee has been acting in breach
21 of his fiduciary duty, whether Mr. Weil controls the
22 committee, and the other allegations. I'm putting everything
23 that the committee is doing sort of aside until that
24 determination is made including the fee application so that
25 when the Court reviews them and when the parties reviewed them

1 we'd have the benefit of an examiner's look see to see if
2 there were inappropriate actions. So really we would have the
3 examiner look at the various allegations against the debtor
4 regarding his management company, regarding whether he hired a
5 private investigator to follow certain committee members or
6 the families, and so forth. And that way we can get a lay of
7 the land as to the actions of both sides in this matter, Your
8 Honor. And so I thought it would be best to bring the
9 examiner motion and get a truly independent report as to the
10 propriety of what's going on in this case.

11 THE COURT: Okay. This is a question for everyone.
12 Can you give me a sense of the extent of the factual record
13 that currently exists that the examiner not should but would -
14 - let's assume the examiner has access to everything that
15 currently exists as known to both sides, would immediately
16 have access to, and the next question after that is how much
17 do you believe an examiner would have to develop a record in
18 addition to what is currently available? Anyone can start.

19 MS. CYGANOWSKI: Probably easier. Nothing easy.
20 Melanie Cyganowski for the committee.

21 I'll limit my comments right now, Your Honor, to the
22 questions you just asked. The committee will just at the
23 outset as we said in our papers, will turn over everything we
24 have to any examiner that may be appointed.

25 We issued several 2004s. Ray Musa responded and

1 appeared. We have documents from him. We issued a 2004 to
2 Mr. Musa Jamal, Eljamal. He did not give us one document. He
3 did not appear for a deposition. We issued a 2004 to Haifa
4 Eljamal. She did not give us one document.

5 THE COURT: That's the debtor's wife, right?

6 MS. CYGANOWSKI: That's the wife.

7 THE COURT: Okay.

8 MS. CYGANOWSKI: There have been allegations, we
9 believe substantiated, but nonetheless still allegations, that
10 Mr. Eljamal is purchasing gas stations in the maiden name of
11 Heifer Eljamal, so we felt that was an important area of
12 inquiry, but she has not appeared for a deposition. Mr. Sammy
13 Eljamal gave us some documents. We tried to, at the request
14 of the debtor's counsel, pare down the list. We did. He
15 never supplemented that list. We have received some documents
16 from the --

17 THE COURT: I'm sorry, he never supplemented to deal
18 with the documents that you pared down to?

19 MS. CYGANOWSKI: The additional ones. Right.

20 THE COURT: Okay.

21 MS. CYGANOWSKI: He initially said we gave to big a
22 list. We worked it down to what we thought were minimally
23 expected documents that he could turn over and those were
24 never produced.

25 We did receive documents from the accountants.

1 Those we have which we can turn over.

2 THE COURT: The accountants for the debtor?

3 MS. CYGANOWSKI: For the debtor. Gray Rock I
4 believe. We have not received any documents in connection
5 with CMS. That was one of the reasons why we sought in the
6 complaint to get an accounting.

7 THE COURT: Well, was there a 2004 CMS?

8 MS. CYGANOWSKI: I do not believe we actually issued
9 one given all of the difficulty we had --

10 THE COURT: Okay.

11 MS. CYGANOWSKI: -- frankly the exercise in getting
12 the 2004s with --

13 THE COURT: Well actually, I purposely tried to stay
14 away from who was at fault --

15 MS. CYGANOWSKI: Who did what.

16 THE COURT: -- in discovery and who wasn't. I'm
17 just trying to figure out what record needs to be developed.

18 MS. CYGANOWSKI: What we know. Exactly. What we
19 have.

20 THE COURT: Right.

21 MS. CYGANOWSKI: So that's what we have.

22 THE COURT: Okay.

23 MS. CYGANOWSKI: So I would think from my vantage
24 point that the examiner needs to explore and investigate CMS.
25 I mean without question the debtor has conceded that CMS holds

1 --

2 THE COURT: All right. No, I --

3 MS. CYGANOWSKI: No, no, property of the estate.

4 THE COURT: I understand.

5 MS. CYGANOWSKI: So that's something that needs to
6 be --

7 THE COURT: So and then as far as -- and maybe
8 you're not the best one to answer this, has there been any
9 discovery with respect to the claims that the debtor disputes
10 against the members of the committee? You know, not in their
11 role as committee members, but the claims that they've
12 asserted in the bankruptcy case.

13 MS. PENACHIO: Your Honor, I did serve 2004 exams
14 and they were objected to vehemently by the creditors
15 committee and by Mr. Coscia and by Mr. Weil on the grounds
16 that it was harassment.

17 THE COURT: Have there been -- so the --

18 MS. PENACHIO: There has been nothing, okay?

19 THE COURT: Okay. All right.

20 MS. PENACHIO: And so I -- it is very frustrating
21 but I will respond to the committee's counsel at the
22 appropriate time regarding the documents turned over by the
23 debtor which were --

24 THE COURT: No, again, this is not a discovery
25 conference. I'm not doing this to deal with issues of

1 production or nonproduction. I'm just trying to figure out
2 what an examiner would do. You know, sometimes examiners
3 pretty much have the factual record and they just are an
4 objective -- the examiner is an objective pair of eyes to look
5 at that record. More often the examiner has to develop the
6 record. There's been -- I'm aware of efforts to get discovery
7 here so I was trying to figure out how much of that role the
8 examiner would have to play.

9 MR. MORGAN: If it please the court. My name is
10 John Morgan. I represent Musa Eljamal in this litigation. I
11 also represented various of the entities in both the federal
12 litigation before Judge Eginton as well as a couple of the
13 cases in the State Supreme Court. So in answer to your --
14 which is, by the way, only a small subset or probably half of
15 the pending litigation. So with respect to those litigations,
16 discovery is not complete in any of them. So that's the
17 claims that the creditor committee class have outside of the
18 scope of the bankruptcy, which is what you asked about a
19 little bit ago.

20 THE COURT: No, that's not only what I'm focusing
21 on.

22 MR. MORGAN: Very well. Then I misunderstood.

23 THE COURT: No, I -- well, I'm sorry, I did think
24 that one potential issue that an examiner could examine would
25 be the validity of the debtor's assertions that the claims of

1 two of the committee members at least, maybe three, other than
2 Mr. Coscia, which is fixed although on appeal, are overstated
3 or should be disallowed. And that litigation is not ongoing,
4 is it? Because that --

5 MR. MORGAN: Oh, it is.

6 THE COURT: By whom? Who's pursuing that
7 litigation? The debtor?

8 MR. MORGAN: Well, right now they're stayed.

9 THE COURT: Well, that's what I'm saying. Okay.

10 MR. MORGAN: All right. I'm sorry.

11 THE COURT: When I said ongoing, I mean it's stayed.

12 MR. MORGAN: They're not proceeding a pace. They're
13 stayed pursuant to the bankruptcy.

14 THE COURT: Was there discovery in those actions
15 though before the automatic stay came into effect?

16 MR. MORGAN: In all of those cases, at least the
17 ones that I was involved in, discovery had commenced but not
18 completed. With respect to one of the state supreme court
19 cases, with respect to one particular location, the discovery
20 consists of about two file boxes. With respect to the federal
21 litigation, the discovery to date is about the same plus a
22 little bit more. Again, all of those -- by way of example,
23 the federal litigation consisted of the primary claim by Mr.
24 Weil and his entities that is really about diverted funds in
25 excess of \$1 million and that's what triggered this whole

1 cascade of litigation that have brought us here. We have some
2 preliminary discovery as part and parcel of the injunction
3 hearing, but we have not done formal discovery with respect to
4 the claims proper. And by way of example, we've produced 90
5 percent of our discovery to I guess the defendants. The
6 defendants have not produced all of their discovery yet.
7 Again, we kind of stopped in the middle. So just in terms of
8 the sheer volume that we're talking about, I would estimate on
9 my subset we're talking about three file boxes worth of
10 material. Now, that does not -- that includes the accounting
11 records up to and including around 2013. I would imagine Ms.
12 Penachio and others have kind of taken that forward since
13 then. So I would imagine, I'm speculating a little bit, but
14 that would probably be another file box or two if that's what
15 you're asking, and maybe I'm misunderstanding.

16 THE COURT: No, that's fine.

17 MR. MORGAN: Okay.

18 THE COURT: And we're talking about claims against
19 the debtor by two of the committee members and claims that the
20 debtor has against -- an assertion that the debtor says those
21 claims were overstated. That's what we're talking about.

22 MR. MORGAN: Correct.

23 THE COURT: Okay.

24 MR. MORGAN: In all the circumstances in which I'm
25 involved they are claims by either Mr. Weil personally or his

1 family's LLCs or trust, whatever. I don't want to misstate
2 what the entities are. Or New York Fuel's or Metro New York
3 Dealer Stations.

4 THE COURT: Against the debtor.

5 MR. MORGAN: All of which are the principle
6 entities.

7 THE COURT: All right.

8 MR. MORGAN: And Mr. Sammy Eljamal is a defendant
9 personally in each of those cases in the New York State
10 Supreme Court case. Musa Eljamal is also a defendant in all
11 of those cases. Various of the 50-50 entities are defendants
12 or -- there's claims and counterclaims, so they're either
13 plaintiffs or defendants depending on the way you look at
14 them.

15 THE COURT: Okay.

16 MS. PENACHIO: Your Honor, may I just seek
17 clarification? If we're talking about only the claim of the
18 other committee member JMM, that is related to -- as I
19 understand it, the Croton litigation. So that would be very
20 discrete. So it would only be the claim --

21 THE COURT: Well, the debtor has said in response to
22 the examiner motion that there's only about 20 claims in this
23 case and more than half filed by committee members and that
24 the debtor believes that most or all of those are
25 objectionable.

1 MS. PENACHIO: Yes. And I have interposed an
2 objection to basically all of them --

3 THE COURT: Okay.

4 MS. PENACHIO: -- on the grounds that they are
5 either duplicative or unliquidated subject to litigation or,
6 you know, the general grounds that they are just not valid.
7 Most significantly the Silverman claim, he is an ad hoc
8 member, is absolutely unsubstantiated but --

9 THE COURT: So --

10 MS. PENACHIO: -- I haven't done --

11 THE COURT: -- one of the thoughts I had, since the
12 committee doesn't seem to have any interest in joining in this
13 objection, and in fact proposes a plan that pays the claims in
14 full, is that that's something an examiner should look at.
15 But if you're confident you have the facts to pursue the
16 objection, maybe the examiner doesn't need to look at it.

17 MS. PENACHIO: I am not confident I have the facts
18 to pursue the objection at this juncture, Your Honor.

19 THE COURT: Okay.

20 MS. PENACHIO: Thank you.

21 THE COURT: Okay. Well objections since it's more
22 than one claim.

23 MS. PENACHIO: Right. Objections. I mean I would
24 just --

25 THE COURT: I mean duplicative claims, I mean that's

1 easy, duplicate claims, but it's --

2 MS. PENACHIO: But it's --

3 THE COURT: Okay. I think I understand what an
4 examiner would be looking at then which is complicated.

5 MS. PENACHIO: It is. It's very complicated and
6 it's --

7 THE COURT: Okay. And it's expensive.

8 MS. PENACHIO: Very. And I've done a lot of the
9 work already.

10 THE COURT: Well, that's another --

11 MS. PENACHIO: I don't have everything that I need -
12 -

13 THE COURT: All right. So that's another question I
14 have. Examiners are useful for two reasons sometimes in
15 bankruptcy cases and I commend the US Trustee for raising this
16 issue because I think something had to be done given that the
17 mediation didn't succeed. One of the things examiners are
18 useful for is laying out the facts publicly so people can
19 settle based on those facts. But of course there's a cost to
20 that. The other is just laying out the facts so that there's
21 a factual record. That's a little less useful because a lot
22 of the stuff that the examiner may get will not be
23 discoverable ultimately and may not be that useful in
24 litigation going forward. What record did you need that you
25 didn't have? Don't tell me about the substance of the

1 mediation, but was one of the reasons the mediation failed
2 that you didn't have a record enough to just --

3 MS. PENACHIO: No.

4 THE COURT: -- you know, people negotiating with
5 their hands behind their backs or blindfolds on because they
6 didn't know the facts? No?

7 MS. PENACHIO: Your Honor, can I update the Court?
8 I had Mr. Oxman's permission to tell the Court where I am with
9 the negotiation with him if that is acceptable.

10 THE COURT: Well, he's representing more than one
11 party.

12 MS. PENACHIO: He is, but I have been in extensive
13 negotiations with him since the conclusion of mediation.

14 THE COURT: For all of --

15 MS. PENACHIO: And his client for the first time in
16 a year I got to meet his client, Brent Coscia, and I believe
17 that that was really important to us being able to forge a
18 settlement. We have --

19 THE COURT: So we're talking about Mr. Coscia now,
20 not other clients of Mr. Oxman.

21 MS. PENACHIO: Just Mr. Coscia.

22 THE COURT: Okay.

23 MS. PENACHIO: And it is, unfortunately, it was very
24 difficult the way the structure of this case was to settle.
25 The one creditor that I settled with, Mitch Nesheiwat from Gas

1 Land, wasn't affiliated with the Weil group and I think that's
2 why I was able to settle with him so readily.

3 THE COURT: All right. So --

4 MS. PENACHIO: It's difficult to --

5 THE COURT: -- you were going to tell me what you
6 were authorized to say by Mr. Oxman.

7 MS. PENACHIO: Say he authorized me to tell you that
8 we were very close. We were very close and he asked if the
9 Court would get involved. I told him I would ask you but I --

10 THE COURT: And this is with respect to Mr. Coscia's
11 claim?

12 MS. PENACHIO: Yes. And may I just --

13 THE COURT: Which would then leave two major
14 creditors, right? Or two major claims to deal with?

15 MS. PENACHIO: Pretty one, Your Honor, because I
16 believe Silverman really doesn't have a claim and I've been
17 working with Mr. Rattet very -- not as closely as I would
18 like, but we have been working.

19 THE COURT: Okay.

20 MS. PENACHIO: So that would mean that we would have
21 Weil left and perhaps with these other creditors resolved we
22 could engage in more fruitful discussions with Mr. Weil or
23 litigate on some of the issues regarding the distributions.

24 THE COURT: Okay. Well that's helpful.

25 MS. PENACHIO: Your Honor, may I just turn to my

1 client for a moment to confirm the closeness of the
2 settlement? Do you have -- may I just -- do you have anything
3 to add?

4 MR. ELJAMAL: I'm very flexible and I'd like to get
5 it over with.

6 MS. PENACHIO: Okay. Thank you, Your Honor.

7 MR. ELJAMAL: I think he's the only situated.

8 MS. PENACHIO: We have -- and Your Honor, I have had
9 many discussions with Mr. Oxman. He has assured me he does
10 not take this personally, and I don't take it personally, so
11 if our pleadings seem to take a harsh stance, he's assured me
12 before I even filed them that he would not take this
13 personally.

14 MS. CYGANOWSKI: With all due respect, Your Honor, I
15 don't want to get into a he said/she said. I don't want to
16 get into who did what at the settlement, and nor do I want to
17 be viewed as carrying Mr. Weil's laundry in any way. What I
18 am upset about is it's giving you one sense that isn't
19 completely what happened. We worked for weeks, months, with
20 the mediator and without the mediator to see if we could
21 resolve. It reached a point where debtor's counsel said that
22 the --

23 THE COURT: I know the mediation didn't succeed. I
24 appreciate that.

25 MS. CYGANOWSKI: No, no, I know. But the global

1 offer that had been presented, a global offer involving
2 everybody was close.

3 THE COURT: I don't have -- and this is on purpose.
4 I don't want to know anything more --

5 MS. CYGANOWSKI: And I understand that.

6 THE COURT: -- about the mediation other than do the
7 parties feel that they need an independent third party to
8 develop more facts for settlement purposes?

9 MS. CYGANOWSKI: For the purpose of that, no. No.

10 THE COURT: Okay. That's all I really wanted to
11 know.

12 MS. CYGANOWSKI: But I would ask to put in play the
13 concept. We're stalled. This case is stalled. We all
14 acknowledge that. We would like -- we put pencils down at the
15 request of the Court with respect to a plan. We would like to
16 try again. It may not be confirmable. We believe that it
17 could be. But at least to put it on the record, to move
18 towards a plan, see if it can be confirmed. If we don't
19 confirm, then we'll do whatever the next step is, but at least
20 move the case. Right now we've been in this no man's land if
21 you will. We've been struggling with not trying to do
22 discovery. It's a crazy place to be. So we would at least
23 like to see if we can move forward with the plan. It may not
24 work. We think it will. If it does, then at least we know
25 where it stands. And if it doesn't, then we'll make the

1 appropriate motions for conversion or whatever is appropriate
2 at the time.

3 THE COURT: Well, I think both sides can move
4 forward with a plan but you still have fundamental issues on
5 the claims.

6 MS. PENACHIO: Right. There's no voting. There
7 will be no way to confirm a plan unless Mr. Coscia votes and I
8 will seek a designation on him. And I think that the Court
9 will receive my papers seeking a designation very --

10 THE COURT: I thought you were --

11 MS. PENACHIO: I'm trying to settle with him but I
12 can't -- I never met him before last week. It's very
13 difficult to settle with a person that didn't show up for a
14 year. The debtor may have been late but at least he showed
15 up.

16 MS. CYGANOWSKI: He didn't show up to you. He
17 showed up to whatever necessary in connection with committee
18 events. And Your Honor can not forget what Mr. Coscia's claim
19 was.

20 THE COURT: Did he show up at the mediation?

21 MS. PENACHIO: I'll defer to Ms. Cyganowski as to
22 that.

23 MS. CYGANOWSKI: He was present by his counsel in
24 the mediation.

25 THE COURT: Oh, that's a problem.

1 MS. PENACHIO: That's the problem, Your Honor. You
2 hit the nail on the head.

3 THE COURT: That's a huge problem.

4 MS. PENACHIO: As soon as I met with Mr. Coscia --

5 MS. CYGANOWSKI: That's easy to say when -- again, I
6 don't want to get into bantering but his claim came about
7 because of the actions of Mr. Eljamal.

8 THE COURT: I don't care. If clients don't show up
9 at mediations, they're not going to work. It's not going to
10 happen.

11 MS. PENACHIO: Right. Your Honor, we had the
12 Christian Brothers case here. There were tort victims here.
13 They made the case get resolved. It was very professionally
14 gratifying when a tort victim shows up. And that's -- and I
15 think that --

16 THE COURT: As far as --

17 MS. PENACHIO: -- meeting with Mr. Coscia had a
18 phenomenal impact.

19 THE COURT: Well look, it clearly -- if the parties
20 don't settle, and it may be a subset of parties who don't
21 settle, there will be significant litigation expense. The
22 question the US Trustee's motion raises is should that expense
23 start now? One of the reasons you appoint an examiner I think
24 doesn't, at least from what I hear, doesn't apply now because
25 people have enough information to negotiate. So other than

1 that, I'm not sure what an examiner would be doing other than
2 getting information that the parties could in part use but in
3 part not use in subsequent litigation.

4 MR. SCHWARTZBERG: Your Honor, I think in two senses
5 an examiner could indicate whether the committee, if it's not
6 acting appropriately, needs to be reconstituted.

7 THE COURT: Well, I appreciate that but it's --

8 MR. SCHWARTZBERG: And in -- I'm sorry, Your Honor.

9 THE COURT: Go ahead.

10 MR. SCHWARTZBERG: And in regard to the debtor's
11 action whether a Chapter 7 trustee should be warranted. So I
12 thought in both veins the examiner would add -- or neither.
13 You know, it keeps -- you know, a committee is acting in a
14 fiduciary capabilities and that the debtor is acting
15 appropriate as well.

16 THE COURT: But that's just a process issue. I mean
17 I think -- you know, I'm happy to -- not happy, but I will
18 hear a motion. If someone wants to appoint a trustee, I'll
19 hear that. If someone wants to sanction the committee, I'll
20 hear that. I'll hear evidence on that. I don't think I need
21 an examiner. I can do that. Ultimately, what the -- this is
22 no knock on examiners. Examiners have done great things in a
23 lot of cases. But ultimately what the examiner says has no
24 legal significance. It's just -- he's not a judge, or she's
25 not a judge. Just one person's opinion. I would still have

1 to have the hearing. So they can be helpful, but mostly to
2 develop facts so the parties can in a streamlined way
3 negotiate. Or if there's like a need for the public to know
4 something like in Enron or a case where there's been fraud
5 that is out there in the world, then it's important to have an
6 examiner because there's this sort of societal basis for it.

7 So I guess -- again, I don't fault you at all for
8 bringing this motion because something had to be done to get
9 the case off the dime. And I think what it does I hope
10 concentrate everyone's mind on, just like in Candide where
11 Admiral Byng is about to be hanged, it does focus the mind, is
12 it highlights the cost of not settling which is huge for a
13 case of this size.

14 So my inclination I guess is to give the parties a
15 brief period to see if they can't settle their disputes. And
16 it doesn't have to be global. Settle as many as you can.

17 MS. PENACHIO: Right.

18 THE COURT: And then we'll have a case conference.
19 I'm not going to deny or grant the examiner motion at this
20 time. It'll be out there. It will be on the same date as the
21 case conference. And we'll decide how to schedule any
22 remaining litigation and whether it will be in the context of
23 a plan or claim objections or a motion for a trustee, you
24 know, any of those things. But I really do think that having
25 now seen what would happen if there is no settlement, people

1 should settle. And if they can't settle, then we'll spend the
2 money but I hope it will be less money than would be spent if
3 you don't have a few weeks to see if you can settle.

4 MR. CUEVAS: Your Honor, you set forth the next date
5 for October the 31st, so would it be appropriate to have like a
6 45-day interval?

7 THE COURT: Yes. It's a little long but I'm okay
8 with that as long as parties get going now as opposed to
9 waiting for a month. I mean I really do think that that
10 should be it, that there shouldn't be any further delay after
11 that. We should, as I sometimes say, have a litigation
12 festival at that point.

13 MR. CUEVAS: And Your Honor, that's why I'm
14 suggesting a 45-day interval.

15 THE COURT: Okay. That's good.

16 MR. MORGAN: Your Honor, again, John Morgan for Musa
17 Eljamal. With respect to Ms. Penachio's submission,
18 incorporating what Mr. Oxman said, I would second that there
19 would be a major benefit to having the Coscia claim excised
20 and whether a special master or special mediator, whatever
21 you're going to call it, basically have a forum to get that.

22 THE COURT: Well, see if --

23 MR. MORGAN: I'll suggest something for -- I didn't
24 mean to interrupt. I'm sorry.

25 THE COURT: Go ahead. That's all right. I thought

1 you were done.

2 MR. MORGAN: I don't mean to step on Anne but my
3 understanding is that there's a done deal and the lawyers are
4 wordsmithing but they can't get it done.

5 THE COURT: Well, whatever. Look, in all instances
6 where someone asks me to get involved in the settlement
7 context I push back and say, you know, you're capable lawyers
8 and you should be able to do it yourselves. I guess I stand
9 ready if you can't but I don't want that to be an excuse for
10 not getting it done yourselves. Okay?

11 MS. PENACHIO: Your Honor, I will advise Mr. Oxman
12 accordingly.

13 THE COURT: Okay.

14 MS. PENACHIO: Thank you.

15 MS. CYGANOWSKI: One other suggestion. While the
16 former judge was unable, would Your Honor be open to asking a
17 sitting judge such as perhaps Judge Stong who has a lot of
18 experience in mediation?

19 THE COURT: Maybe. I mean I'd like to see where we
20 are. I mean I get the impression that there are a couple of
21 settlements that are on the verge or maybe ones actually
22 agreed still with the gas company but --

23 MS. CYGANOWSKI: I don't think they're that close
24 but that's not -- I'm not in it.

25 THE COURT: That's something I would consider but I

1 just don't want to -- that's something people can raise during
2 the 45 days if they want to. I don't want to decide it now.

3 MS. CYGANOWSKI: Okay.

4 THE COURT: I have great confidence that Judge Stong
5 would do a great job on this. I'd like to give her, if she
6 would take it, as little to do as possible.

7 MR. MORGAN: Presuming she has other work.

8 THE COURT: Well, I mediated a case for her once
9 where the first mediation session was just deciding what we
10 were going to mediate. So I -- but that's not her fault.
11 That was the parties' fault. So I want to avoid that. Okay.
12 So I'm going to adjourn the examiner motion to that date. Is
13 it Halloween? Is that the date? October 31st?

14 MS. CYGANOWSKI: The earmarked date, Your Honor, the
15 --

16 THE COURT: Whatever that date is in October.

17 MS. CYGANOWSKI: October 31st.

18 THE COURT: All right. And if people want to -- I'm
19 not encouraging you to do this, but I'm just saying if anyone
20 in the case wants to, for want of a better term, get the case
21 off of the dime by filing some other motion, and I'm not
22 saying what any other motion would be warranted, but if anyone
23 wants to do that, they should do that with enough notice so
24 that's also on for the 31st or whatever this date is. I think
25 that Mr. Cuevas said it was the 31st.

1 MS. PENACHIO: Your Honor, I just want to alert the
2 Court and the parties that there is a, and Mr. Kraut knows
3 this, there is a motion for summary judgment on November 4th as
4 well.

5 THE COURT: In what?

6 MS. PENACHIO: In this case.

7 THE COURT: But in what matter?

8 MS. PENACHIO: In the debtor versus New York fuel to
9 determine the extent of this --

10 THE COURT: All right. But I thought you were far
11 along in negotiations on that one.

12 MS. PENACHIO: Not on that particular summary
13 judgment motion.

14 THE COURT: All right. Fine.

15 MS. PENACHIO: So that's on for the 4th.

16 THE COURT: All right. Well, let's keep that there
17 and have the other things on the 31st of October.

18 MS. PENACHIO: Very well, Your Honor. Thank you.

19 THE COURT: Summary judgment is kind of a separate
20 issue. Hopefully maybe you can settle that too. But I don't
21 want it to have -- I want to prepare for that separately.

22 MS. PENACHIO: Thank you, Your Honor.

23 THE COURT: Okay. Does anyone have any questions on
24 any of that? Okay. Were the other clients involved in the
25 mediation or was it all lawyers?

1 MR. MORGAN: Which mediation are we talking about?

2 THE COURT: The plan mediation.

3 MR. MORGAN: Then I'll sit down.

4 MR. RATTET: Mr. Silverman himself participated.

5 THE COURT: Okay.

6 MS. CYGANOWSKI: As did Mr. Weil.

7 THE COURT: Okay. All right. So I think that then
8 leaves the adversary proceeding and the motion to dismiss. I
9 don't know what we want to do with this. I had a basic
10 question which was raised -- I mean I had before then but it
11 was raised by a late -- not late, but a later filing. Have I
12 granted standing on this? Is there an order granting standing
13 to bring this --

14 MS. PENACHIO: No, Your Honor.

15 THE COURT: -- adversary proceeding?

16 MS. PENACHIO: No, Your Honor.

17 THE COURT: All right. I mean Ms. Cyganowski,
18 that's right?

19 MS. CYGANOWSKI: Yes. That's correct, Your Honor.

20 THE COURT: Okay. So I mean I think that's a gate
21 keeping issue.

22 MS. CYGANOWSKI: And we understand. We were trying
23 to avoid the other skirmishes and obviously there's this one
24 here.

25 THE COURT: Okay. So I mean it does appear to me on

1 its face that the alleged grounds for veil piercing here are
2 general as opposed to specific to any particular creditor
3 which would make it -- the committee is bringing in on behalf
4 of all unsecured creditors so to me it falls right into the
5 case law that says that it's a debtor cause of action first.
6 One needs to have standing.

7 MS. CYGANOWSKI: The difficulty is that we're not
8 seeking recovery. We're seeking an accounting for --

9 THE COURT: Well, you're seeking to pierce the veil
10 though.

11 MS. CYGANOWSKI: We are for the purpose of getting
12 an accounting in order to --

13 THE COURT: But I'm not even sure what the
14 accounting -- on what authority -- I guess I'm jumping ahead
15 and I don't particularly want to because I really think they
16 should be put off.

17 MS. CYGANOWSKI: Okay. We could bring a --

18 THE COURT: But one of my question is what is the
19 basis for an accounting? I mean it's -- if the veil is
20 pierced, then this entity would be the debtor and would have
21 to comply with all the requirements of a debtor in a
22 bankruptcy as if -- I'm sorry. Mr. Eljamal would include this
23 entity then and therefore any of the entities' disclosures
24 wouldn't have to be part of his case. It's not a corporate
25 accounting motion.

1 MS. CYGANOWSKI: Correct. We're trying to find the
2 money. We're trying to find out where the money is flowing
3 but --

4 THE COURT: All right. But that's what --

5 MS. CYGANOWSKI: But we'll do that through 2004.
6 We'll put this -- we respectfully ask that this be adjourned.

7 THE COURT: I thought everyone had. See, that's why
8 I asked does everyone have the information they need to
9 negotiate.

10 MS. RODRIGUEZ-McCLOSKEY: Judge, Yenisey Rodriguez-
11 McCloskey on behalf of Centralized Management Services, Inc.

12 THE COURT: Right.

13 MS. RODRIGUEZ-McCLOSKEY: The committee has
14 indicated they never served the 2004 for CMS.

15 THE COURT: Look, that's -- I know you're all --
16 you've been waiting all day and you're ready to go on this but
17 I don't want to hear it. I mean because not that it doesn't
18 make any sense in the right context, but it just doesn't right
19 now.

20 MS. RODRIGUEZ-McCLOSKEY: Understood, Judge. I just
21 want to point out that we believe the jurisdictional ground,
22 as the Court indicated, is threshold --

23 THE COURT: Well, the standing issue, yes.

24 MS. RODRIGUEZ-McCLOSKEY: Yes. And that that should
25 be decided before we reach the merits.

1 THE COURT: Yes. I think so. I think so. I'm
2 going to do it on the St. Paul Fire case, the Petsco case, 884
3 F.2D 688 (2d Cir. 1989) and its progeny. And you know, this
4 is not -- I mean obviously there's a conflict here, but that's
5 not the only part of the analysis for standing. There's also
6 a cost benefit analysis. And you know, in some respects the
7 complaint is -- I would need to know more about cost benefit
8 than just having a complaint. Put it that way. I have a lot
9 of question marks in the complaint, i.e., you know, it's --
10 there are a lot of statements in there. I appreciate that the
11 committee may want more information, but it's really kind of
12 History Channel pleading. You know, there might be life on
13 planets out there. Who's to say there isn't? You know, that
14 type of pleading. It's not that bad, but you know how the
15 History Channel works. They say things like that all the
16 time. Hitler may have developed UFOs.

17 So I think we should just put off the motion to
18 dismiss and focus on standing first if we're going to do it
19 really on a cost benefit analysis. There's no statute of
20 limitations we're worried about here. Okay.

21 All right. So I'm going to adjourn the motion to
22 dismiss too.

23 MS. PENACHIO: Thank you, Your Honor.

24 THE COURT: And I think if it comes up on the 31st,
25 if we're not at the settlement phase and the committee is

1 still pursuing this, I'm giving you the heads up the first
2 thing I'm going to focus on is standing and the basis for the
3 cost-benefit basis. You know, obviously, there's a conflict
4 issue here. But even if there's a conflict, a debtor can say
5 this is not worth pursuing, this is not money well spent, you
6 should do this instead. Okay. So I'll see you then.

7 And again, if you're, you know, three weeks into
8 this and someone feels that an objective third party, whether
9 it's me or another bankruptcy judge or someone would be useful
10 and something discrete that you could identify for that
11 person, you know, give me a call all of you together who are
12 involved in it and we'll discuss that. But hopefully --

13 MS. CYGANOWSKI: Thank you very much, Your Honor.

14 MS. PENACHIO: Thank you, Your Honor.

15 THE COURT: Hopefully you'll make a lot of progress
16 at least on some of the issues.

17 MS. PENACHIO: Thank you, Your Honor.

18 THE COURT: Okay.

19 (Proceedings concluded at 12:51 p.m.)

20 * * * * *

21

22

23

24

25

1 I certify that the foregoing is a court transcript from
2 an electronic sound recording of the proceedings in the above-
3 entitled matter.

A handwritten signature in black ink, appearing to read "Mary Greco", written in a cursive style.

Mary Greco

7 Dated: September 22, 2016